

First, the AG's Complaint does present a *prima facie* case requiring a hearing. A complaint establishes a *prima facie* case when, on its face, it states sufficient allegations that, if uncontradicted by other evidence, would entitle the complainant to the requested relief.¹ The standard is not that the complaint must state a case that cannot be contradicted, as Atmos suggests with its efforts to contradict the facts presented. Rather, the standard is that if uncontradicted, the allegations would entitle the Complainant to the requested relief.

In *Kanawha Hall*,² the complaint alleged that the Complainant was being charged the rate established by the tariff, but asked for different treatment because others were being charged less under right of way contracts. Having stated that it was being charged the rate established by the tariff, there was no ground on which relief could be granted. There, even if the facts alleged were uncontradicted, there was no ground for relief. Here, by contrast, if uncontradicted, the evidence shows that the achieved rate of return for Atmos has consistently been well above both the rate of return established for it in its last case as well as being well above the allowed rates of return appropriate in today's financial environment. Atmos's efforts to manipulate the numbers it has previously provided to the Commission to lower the returns stated in those numbers as originally provided to the Commission aside, the fact remains that the evidence of public record shows Atmos to have been earning well in excess of appropriate amounts for a length of time sufficient to warrant an inquiry into whether the rates continue to be fair, just

¹ *In the Matter of Kanawha Hall v Equitable Production Company*, PSC Case No. 2004-00307, Order of October 2, 2004, pp. 2-3.

² *Id.*

and reasonable, and to lower the rates if they are too high. If uncontradicted, the facts alleged in the Complaint do state a ground for relief. The *prima facie* case is made. An investigation into the rates of Atmos must be instigated and rates lowered if that investigation demonstrates they are too high.

Unlike utilities that have all of the facts at their fingertips, challengers who exercise their rights under KRS 278.260 must act on evidence that is of public record and on that information the utilities will voluntarily turn over to them. In reciting and relying on the figures provided to the Commission by the utilities of their achieved returns, the AG has presented that which is available as a matter of public record. Recognizing that those numbers have not been adjusted for ratemaking purposes does not make them any less reliable for the purpose of determining whether a *prima facie* case has been presented as there is no basis on which to assume that the adjusted numbers would vary significantly from the reported numbers. Further, there is nothing of public record that would allow such an adjustment prior to an investigation in which the pertinent numbers were brought to light pursuant to the power of the Commission.

While Atmos contends that the ratemaking adjustments it has to offer will bring the returns reported down significantly and that therefore unadjusted numbers cannot be the basis for the finding that a *prima facie* case has been made, the AG has never seen the Commission fully agree with all ratemaking adjustments proposed by any party, be it the utility or the intervenor. Therefore, the proposed ratemaking adjustments themselves present issues of fact which

are the very meat of a hearing to be held subsequent to the finding that the *prima facie* case, the case that would present a cause for relief if facts alleged are uncontested, has been made.

Too, as the testimony presented by the AG candidly admits, it was without facts it would have wished to present. This however, was not because no effort was made to garner and present those facts, but rather, because Atmos refused to provide the information necessary to do so.³ Atmos now wants to bootstrap its lack of cooperation and the consequent gap in information into an assertion that the Complaint fails to make a *prima facie* case. Allowing this bootstrapped defense to prevail would render KRS 278.260 meaningless.

Atmos appears to take umbrage with references to the current financial picture and to the allowed returns the Commission has awarded. Here too, Atmos's attack on the sufficiency of the facts stated to constitute a *prima facie* case

³ For instance, in order to determine AEC's effective composite cost of long- and short-term debt, the AG submitted the following requests for information to AEC:

- Q.4: The "Kentucky-Only FERC Form No. 2 Information" reports page 116, line 62 show "Other Interest Expense" amounts of \$793,575 for 2001, \$586,293 for 2002 and \$396,681 for 2003. For each of these Other Interest Expense amounts, indicate what these interest expenses represent and what portion of these annual interest expenses are for short term debt interest.
- Q.5: For the 12-month period ended 9/30/04 provide (a) the Interest on Long Term Debt, (b) Amortization of Debt Disc. & Exp., (c) Amort. of Loss on Reacquired Debt, and (d) Short Term Debt interest expenses.....
- Q.6: Please provide the actual Short Term Debt (Acct 231 – Notes Payable) balances for each of the months in 2001, 2002, 2003 and 2004 through September.
- Q.7: ...Please provide the monthly Long Term Debt balances for each month from 12/31/2000 through 9/30/2004.
- Q.8: Please provide a breakout of the total Long Term Debt balances as of 12/31/03 and 9/30/04 by Long Term Debt issue and the stated interest (coupon) rates for each of these Long Term Debt issues.

AEC refused to respond to these interest expense related requests for information because it either deemed the requested information to be "not necessary in the determination of the reasonableness of earnings," or to be "not related to previously supplied data."

must fail. The Commission is free to take administrative notice of matters of common knowledge such as the current financial environment in which utilities are operating. Not only is that information commonly followed by the Commission and subject to assessment within the Commission's sphere of expertise, it has been specifically presented to the Commission for its consideration recently in two gas cases, one of which was settled and one of which was fully litigated. Likewise, the Commission is free to take administrative notice of the allowed returns on equity that have been awarded and the discrepancy between reported achieved returns and currently allowed returns.

Atmos contends that in pointing to the allowed return/achieved return contrast as a central element of its testimony, the AG is soliciting single-issue ratemaking by the Commission. Make no mistake. The Attorney General is not seeking single issue ratemaking, but rather is pointing to a change in one expense that ordinarily has a material impact on rates, awarded returns on equity appropriate to the current financial environment and level of risk faced by the company, and in light of that seeks a full examination of all of the company's expenses and revenues to determine whether their rates continue to be fair just and reasonable as evidenced by achieved rates of return that far exceed the allowed rates of return being awarded today.

In single issue ratemaking, the overall financial picture of the utility is studiously and deliberately avoided, examining only the expense at issue. By contrast, the Attorney General is pointing to the achieved rate of return which is

a consequence of all of the revenues and expenses of the utility and to one expense, the allowed rate of return, that is capable of creating a material impact on the company's overall financial well being and is asking for the review to determine whether as a result rates continue to be fair, just and reasonable, or whether they need to be reset on a going-forward basis. The AG welcomes a full investigation, but in stating its *prima facie* case he is working within the limits of the information available outside of the Commission's ability to require Atmos to present all of the facts that would lead to a determination of fair, just and reasonable rates.

In its Answer, Atmos presents its own version of the facts and prematurely attempts to get the Commission to rule as if the facts had been fully developed in the context of discovery and a hearing by arguing that the Complainant bears the burden of proof and that it must meet this burden with substantial evidence. Today, the Commission must only determine whether a *prima facie* case has been made, a case that if uncontradicted would entitle the AG to the relief requested. The *prima facie* case has been made. Therefore an investigation should be opened and pursued as was done with reference to Kentucky Utilities and Louisville Gas and Electric Company in 1999.⁴

⁴ See, Order of April 13, 1999 entered in *Kentucky Industrial Utility Customers, Inc. v. Kentucky Utilities Company*, Case No. 99-083 and *Kentucky Industrial Utility Customers, Inc. v. Louisville Gas and Electric Company, Inc.*, Case No. 99-082 merging the holding that a *prima facie* case had been made and merging the cases into and considered with Case No. 98-474 and 98-426, respectively, which are more fully cited as *In the Matter of: Application of Kentucky Utilities Company for Approval of an Alternative Method of Regulation of its Rates and Services* and *In the Matter of: Application of Louisville Gas and Electric Company for Approval of an Alternative Method of Regulation of its Rates and Services*, respectively.

CONCLUSION

The Commission should find that the Complaint makes a *prima facie* case and should require Atmos to satisfy or Answer the Complaint. Further, as only the Commission has the power to require Atmos to produce the facts that would allow a determination of the fairness, justness and reasonableness of the rates, the Commission should establish a procedural schedule that requires Atmos to produce such information as is necessary to make that determination, that allows the Attorney General and any other interested party to test the accuracy of that information, and following a full hearing, should establish fair, just and reasonable rates for Atmos on a going-forward basis.

Respectfully submitted



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NOTICE OF FILING AND CERTIFICATION OF SERVICE

I hereby give notice that I have filed the original and ten true copies of the foregoing with the Executive Director of the Kentucky Public Service Commission at 211 Sower Boulevard, Frankfort, Kentucky, 40601 this the 25th day of February, 2005, and certify that this same day I have served the parties by mailing a true copy, postage prepaid, to the following:

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